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CALIFORNIA EMPLOYMENT LAW NEWSLETTER

What's New for California Employers?

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The following is a brief summary of the significant employment law developments since our last newsletter.[1]

DISCRIMINATION

"Me Too" Doctrine: A plaintiff cannot prove discrimination through discriminatory remarks about persons outside the plaintiff's protected class. *Hatai v. Department of Transportation*. In this case, the plaintiff claimed that he was discriminated against because of his Asian heritage and the court disallowed proof of discriminatory remarks against persons of non-Asian heritage. *Comment:* This decision is welcome news to defense counsel wishing to eliminate hateful but not discriminatory comments by a defendant.

Application Dishonesty: An employer could terminate an employee who admitted that he was a recovering drug addict after he had denied the same on his employment application. *Reilly v. Lehigh Valley Hospital*. The court found that the dishonesty on the application overcame the claim that the plaintiff was terminated as a pretext for discrimination. *Comment*: Ordinarily, termination of a recovering drug addict, in an approved rehabilitation program, is unlawful. However, here the court found that the dishonesty trumped the protection that the plaintiff would have otherwise had.

Ageist Comments: Age-related statements allegedly made to an employee were not direct evidence of discrimination because they were unrelated to her termination and were not made by the decision-maker responsible for terminating her employment. *Marsh v. Associated Estates Realty Corp.* The court also found that the employee failed to show that the employer's reasons for terminating her (i.e., her repeated poor test scores and policy violations) were pretextual. *Comment*: While this decision comes from a federal appellate court outside of California, it fairly states California law on this issue.

FAMILY MEDICAL LEAVE ACT

Individual Notice: An employer's obligation to give individuals notice that they are using FMLA leave is absolute. *Young v. The Wackenhut Co.* This is so despite the fact that the employer had provided proper notice of FMLA leave rights in its employee handbook. *Comment*: The Court reasoned that because the employee might have structured her leave differently if she knew that her FMLA entitlement was expiring, she had been prejudiced by the lack of that notice.

New Position: Transferring plaintiff to a new position was not reinstatement to an "equivalent position" as required by the FMLA. *Dollar v. Smithway Motor Xpress, Inc.* In this case, the transfer to a driver-recruiter position was not the same as the driver-manager position previously held by the plaintiff. The court also found that an award of ten years of future earning's loss was too speculative as it was conjecture that plaintiff would remain in a job that she had never actually performed, especially where the former employer's business was undergoing various uncertainties. *Comment:* Termination or adverse action of any plaintiff who is on protected leave should be carefully scrutinized as these are high-risk situations.

[1] This summary is intended to be a brief overview of significant legal developments and is not an in-depth analysis of the cases or statutes discussed. Our clients are advised to contact their employment attorney before making significant decisions related to the legal developments reported herein. *NOTE*: These cases have not been updated/cite-checked since they were first reported.

CLASS ACTION

Class Certification: The ability to establish class-wide damages is essential to a favorable ruling for plaintiffs on class certification. *Comcast Corp. v. Behrend*. In this antitrust lawsuit, plaintiff provided expert testimony based on a regression model purporting to compare actual cable prices in the Philadelphia area with hypothetical prices that would have prevailed but for Comcast's alleged anti-competitive prices. The expert did not, however, link the alleged damages to the plaintiff's theory of antitrust impact. *Comment*: Although not an employment action, the principle would apply directly to an employment class action.

Managerial Exemption: Employees who attempt to certify class claims of "misclassifications" of exempt employees have a difficult row to hoe. *William Daily v. Sears, Roebuck & Co.* Here, the court found that the common questions of fact did not predominate over the individual ones and were not suitable for class-wide treatment. Evidence was presented that different job duties were performed by employees at different locations and that employees spent divergent amounts of time on non-managerial tasks. *Comment*: In general, appellate courts seem to be scrutinizing whether class certifications are appropriate to a far greater extent than in prior years.

ARBITRATION

Foreign State Choice of Law: A law firm could not compel an employee to arbitrate her statutory employment discrimination and wrongful termination claims pursuant to an arbitration provision that included a foreign-state choice of law provision. *Harris v. Bingham McCutcheon LLP*. Here, the provision was itself unenforceable under foreign state's laws. *Comment*: It's curious that a sophisticated law firm would make such an obvious error.

Unconscionability: An employer's arbitration agreement was unconscionably one-sided and thus unenforceable. *Compton v. Superior Court*. Here, the court found that the agreement compelled employees to arbitrate the claims they are most likely to bring while retaining for the employer the right to litigate claims it was most likely to bring through civil action. Also, the agreement contained a statute of limitations that was shorter than the limitations period provided by statute for the claims involved. *Comment*: Employers should avoid inserting provisions which give them advantages that do not exist should the same employment action be brought in civil court. Doing so will effectively provide the employee with the opportunity to litigate in either arbitration or civil court, as the employee chooses.

OTHER DEVELOPMENTS

Sexual Harassment: Crude and offensive remarks by a male co-worker to a female employee did not create a pervasively hostile work environment when the two employees worked together no more than once a week. *Westendorf v. West Coast Contractors of Nevada, Inc.* In this case, plaintiff was subjected to rude sexual comments by a co-worker which was overheard by her supervisor, who did nothing, and on one occasion joined the comments. *Comment*: The fact that plaintiff worked with the offending employees only once a week did not provide ample time for a "pervasively hostile work environment" to exist.

Disability Discrimination: Deafness in one ear is not a disability under the ADA Amendments Act because the plaintiff did not establish that she was substantially

limited in the major life activity of hearing. *Mengel v. Reading Eagle Co.* Here, Plaintiff was still able to hear even though she was deaf in one ear but had difficulty in a noisy environment so that she could not cite any specific instances where her hearing loss caused a problem other than that she "didn't hear some things." *Comment:* This is a Pennsylvania federal court interpreting federal law. It is likely that a California court interpreting California law would find otherwise as California law more loosely and generally defines what constitutes a "disability."

Privacy: A supervisor who told plaintiff's co-workers that she was bipolar violated plaintiff's privacy rights. *Ignat v. Yum! Brands, Inc.* In this case, the court found that a verbal disclosure can constitute an "invasion of privacy by public disclosure of private facts." *Comment*: As a general rule, discussion of medical/health information about employees should be avoided in the workplace.

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If you have questions regarding any of the aforementioned employment law developments, contact your LGG attorney or Ron Souza at rsouza@lgglaw.com.